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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

DAVID B. GROSS

Petitioner,

v.

CHEVROLET COUNTRY, INC.

Respondent

On Petition For Writ Of Certiorari
To The Supreme Court of the
State of Mississippi

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, consistently with the Due Process Clause of the Fourteenth Amendment, and pursuant to a Mississippi long arm statute that provides that a nonresident corporation not qualified to do business in Mississippi that commits a tort in whole or in part in Mississippi is deemed to be doing business in Mississippi, a Mississippi court may exercise *in personam* jurisdiction over a nonresident (Texas) automobile agency of a national automobile company (General Motors) involving negligent repairs made in Texas by the nonresident automobile agency on a vehicle owned by a resident of Mississippi which resulted in damages occurring in Mississippi and where the nonresident automobile agency knew at the time the negligent repairs were made that the vehicle belonged to a Mississippi resident and that the Mississippi resident was going to immediately take the repaired vehicle back to Mississippi where the resulting damages occurred.

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CITATION OF OPINIONS BELOW

The published opinion of the Supreme Court of Mississippi is reported as ***David B. Gross v. Chevrolet Country, Inc.***, 655 So.2d 873 (Miss. 1995) and is included in the Appendix to the Petition, beginning at page A-1. The unpublished order overruling petitioner's motion for a rehearing dated June 22, 1995, is included in the Appendix, beginning at page B-1.

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JURISDICTION

The Supreme Court of Mississippi overruled Petitioner's Motion for a Rehearing on June 22, 1995. See Appendix B-1.

Petitioner's Petition for a Writ of Certiorari was mailed on September 18, 1995, United States Mail, Postage prepaid and was received by the Clerk of the Supreme Court of the United States on September 20, 1995. The petition for a writ of certiorari seeking review of a judgment of a lower state court of last resort was timely filed with the Clerk within 90 days after entry of the order denying discretionary review.

The Clerk of the Court returned petitioner's brief with instructions to make it comply with the Rules of the Court effective October 2, 1995. This brief complies with said rules and has been filed within the sixty (60) day period allowed by the rules.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> ...[N]or shall any State deprive any person of life, liberty, or property, without due process of law...

28 U.S.C. Sec. 1257 provides, in pertinent part:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Sec. 13-3-57 Mississippi Code of 1972, Ann. provides in pertinent part:

> Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the Constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be

performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this state.

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STATEMENT OF THE CASE

This is an appeal from a decision of the Supreme Court of Mississippi denying the Petitioner, David B.Gross, a resident of Mississippi, his constitutional right to bring suit in Mississippi against the Respondent, Chevrolet Country, Inc., a Texas General Motors agency, for damages incurred in Mississippi but caused by the negligence of Chevrolet Country in Texas.

The suit was clearly authorized by the tort prong of the Mississippi long arm statute. Section 13-3-57, Miss. Code Ann. (1972)

> Any nonresident...corporation not qualified...as to doing business herein, who shall...commit a tort in whole or in part in this state against a resident...of this state, ...shall by such act or acts be deemed to be doing business in Mississippi and shall thereby be

> subjected to the jurisdiction of the courts of this state... .

Petitioner, a resident of Jackson, Mississippi, had difficulty with his GMC van while traveling in Austin, Texas. On September 1, 1985, Petitioner had a wrecker tow his van to the service department of respondent in Austin Texas. On September 4, 1985, respondent delivered the van back to Petitioner. The fuel injection pump had been repaired, which required removing the intake manifold from the van engine. The cost of the repairs was $424.85.

On January 27, 1986, Appellant drove to his office in Jackson, Mississippi, and at 6:00 p.m. tried to start the van to go home. Unable to get the van started, he had the van towed to Fowler-Buick, GMC, a Jackson, Mississippi, GM agency. On February 4, 1986, Fowler returned the van to Appellant with a statement for $4,723.85 for repairs.

The cause of the damage to the engine was a 3/8 inch nut of the style and size of the nuts used on studs that hold the intake manifold in place. The nut had been negligently left in the air intake system by the agents and employees of Chevrolet Country, Inc., on September 4, 1985.

The 3/8 inch nut was, at the time it was left in the air intake system, too large to go through the opening created by the intake valve when it was opened to permit air to enter the cylinder. For some five months the 3/8 inch nut bounced up and down inside the air intake manifold.

Finally, it was worn down in size to the point that it could and did enter the cylinder, at which time it was caught between

the top of the piston and the air intake valve, causing the stem of the air intake valve to bend and to lock the engine.

The negligence of the agents and employees of respondent in allowing the nut to enter the air intake system of petitioner's van took place in Texas and was the beginning of the tort. Five months later, in Jackson, Mississippi, the worn nut entered the engine cylinder locking up the engine. The negligence of leaving the nut in the engine took place in Austin, Texas. The damages caused by leaving the nut in the air intake system took place in the First Judicial District of Hinds County, Jackson, Mississippi.

There was no possible way that anyone other than Chevrolet Country could have been responsible for the nut in the air intake system because of the unique engine cover over the rear of the van's engine which was not removed at any time after the repairs by Chevrolet Country until the repairs for the damage were made by Fowler Buick. The petitioner pled the doctrine of *res ipsa loquitur*, which is applicable here. The radiator, transmission, oil supply, battery, power steering and brake fluid are all serviced from the front of petitioner's van. The air cleaner with access to the air intake manifold is at the rear of the engine which is located in the cab of the van and is covered by a huge engine cover which weighs approximately fifty pounds and is held in place by four phillips bolts, two one-half inch metal screws and two large clamps. The engine cover was not removed from the time it was replaced by respondent after repairing the fuel injection pump until it was removed by Fowler to make the repairs caused by negligence of respondent.

Petitioner filed suit in the Circuit Court of Hinds County,

Mississippi.[1] The respondent filed a motion for summary judgment alleging the absence of *in personam* jurisdiction. The trial court granted the motion for summary judgment. On appeal from the granting of the summary judgment, the Supreme Court of Mississippi affirmed the granting of the summary judgment by the trial court. Petitioner's motion for a rehearing was overruled.

> Any nonresident...corporation not qualified...as to doing business herein, who shall...commit a tort in whole or in part in this state against a resident...of this state, ...shall by such act or acts be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this state... .

THE MISSISSIPPI SUPREME COURT DECISION

In the opening sentence of its Conclusion, ***Gross v. Chevrolet Country, Inc.***, 655 So. 2d 873, 879, the Supreme Court of Mississippi held.

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[1] Fowler Buick and General Motors were also named as parties defendant. Petitioner had Fowler check the van in anticipation of the trip to Texas and in the process Fowler removed and replaced the engine cover. The engine cover was not removed again until it was removed by Chevrolet Country when it made its repairs. As the discovery progressed it became obvious that Chevrolet Country was responsible for petitioner's damages. The suit was settled as to Fowler and GM and continued as to Chevrolet Country.

> To allow assertion of *in personam* jurisdiction by our courts in this instance would likely prompt reciprocal action by other states toward Mississippi citizens. Emphasis supplied.

The Court saying that to allow petitioner to sue Chevrolet Country, Inc., for its tort in Texas that resulted in damages to petitioner in Mississippi would prompt the courts of other states to assume jurisdiction when their citizens are damaged by Chevrolet dealers in Mississippi.

The Mississippi Supreme Court cannot protect Mississippi General Motor's dealers from the consequences of their torts committed on citizens of other states. It can and has taken away from petitioner and has announced its intention to take away from all Mississippi citizens their constitutional due process right to sue for damages incurred in Mississippi caused by torts committed against them by automobile dealers in other states.

To not "allow" petitioner to sue for damages in Mississippi caused by a tort committed in Texas, the Mississippi Supreme Court had to come up with a highly contrived and completely erroneous decision.

Petitioner stated a *prima facie* cause of action and for the purposes of a motion for summary judgment and a determination of jurisdiction should have been accepted as true. The Mississippi Court could not follow accepted law because to do so would "allow" petitioner to sue in Mississippi.

The Mississippi Court then held that the nexus requirement of the doing business prong of the Mississippi long

arm statute was applicable when petitioner filed suit, even though petitioner was proceeding under the tort prong of the statute, citing ***Southern Pacific Transp. Co. v. Fox***, 609, So. 2d 357, 360 N5 (Miss. 1992). ***Southern Pacific*** involved an accident that occurred in Louisiana. The Court in ***Southern Pacific*** specifically held that if the tort had been committed in whole or in part in Mississippi, the Mississippi Court would have had jurisdiction. ***Southern Pacific***, 360 N4.

Using a completely erroneous reading of ***Southern Pacific***, the Mississippi Court then proceeded to judge the case *sub judice* by the requirements of ***Mladinich v. Kohn***, 250 Miss. 138, 148, 164 So. 2d 785, 790 (Miss. 1964).

Mladinich was decided prior to Chapter 320 laws of 1964 which amended the long arm statute by adding the contract and tort prongs and did not require a doing business nexus for either. ***Southern Pacific***, 360 N4.

When the damages occurred in Jackson, Mississippi, the respondent was doing business in Mississippi.

In ***Smith v. Temco, Inc.***, 252 So. 2d 212 (Miss. 1971), the identical tort prong of the long arm statute was involved and the Supreme Court of Mississippi held

> The tort is not complete until the injury occurs, and if the injury occurs in this State, then, under the amended statute, the tort is committed, at least in part, in this State, and personam jurisdiction of the nonresident tort feasor is

> conferred upon the Mississippi tort.

In *Temco*, the defendant had no ties whatsoever with Mississippi. Its defective heating unit was sold to an out-of-state distributor who sold same to a contractor building an addition to plaintiff's house. The defective heater caused the house to burn. The Mississippi Supreme Court held that the state court had in personam jurisdiction in a suit against *Temco*.

> In our view, one of the fundamental objects of the Legislature in adopting the 1964 amendment was to extend the personam jurisdiction of the courts of this State to the nonresident who may commit a tort in this State, either in whole or in part, to the injury of a resident of the State so as to provide a practical means for the enforcement of rights accruing under the products liability doctrine.

The only question to be resolved under due process analysis is whether it would be fair, just and reasonable to require respondent to defend itself in Mississippi. There are many factors to be considered.

Respondent caused the injury in Mississippi. Fair play would not require petitioner to go to Austin, Texas to present a cause of action for damages incurred in Mississippi and caused by the respondent.

In ***Brown v. Flowers, Industries, Inc., et al.***, 688 F.2d 328, (5th Cir. 1982), Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit denied, March 7, 1983, 75 L.Ed 2d U.S. Supreme Court Reports 496, the sole contact to Mississippi was a single tortious phone call placed by Jerome Kralis from his office in Mentone, Indiana, to the United States Attorney in Oxford, Mississippi, and the court reasoned that the defendant would have to bring only one witness to Mississippi, the person who made the phone call. In this case the respondent would not have any witnesses. In response to discovery, respondent indicated that the two mechanics who made the repairs to petitioner's van no longer worked for respondent and their whereabouts are unknown.

Foreseeability is one of the tests set out in ***World-Wide Volkswagen v. Woodson***, 444 U. S. 246, 297, 100 S.Ct. 559,567, 62 L.Ed.@d 490 (1980). It is obvious that an automobile dealer can foresee damages resulting from negligent repairs. Being sued in the damaged customer's residence would be only a mild inconvenience to the multi-million dollar automobile agency while it can be cost-prohibitive where the individual is concerned.

REASONS FOR GRANTING CERTIORARI

The issue before the Court is most serious. The National Highway Traffic Safety Administration made a study of consumer losses in auto repair and maintenance. A copy of the report dated May 1978 was attached to Petitioner's complaint as part of the proof in his case. The study found as follows:

> "The Task force systematically analyzed the repair process and estimated that consumers lose about $20 billion annually due to improper or unnecessary repair and maintenance practices. The losses consist of wasted repair expenditures, wasted fuel, avoidable accidents and pollution, and reduced car life."

The Task Force did not break out losses as to out of state customers versus in state customers, however, it can be assumed that the losses would be at least proportionately as great.

General Motors and two General Motors' agencies were named as parties defendant. Not one of them questioned the accuracy of the report or indicated that the situation has improved.

Petitioner's experience proves the accuracy of the report. Negligent repairs by Chevrolet Country in the amount of $424.85 cost Petitioner an additional $4,723.85.

I. THE CONSTITUTIONAL RIGHT OF DUE PROCESS HAS BEEN DENIED PETITIONER BY THE SUPREME COURT OF MISSISSIPPI, IN A MANNER WHICH IS SO FAR FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS

TO CALL FOR AN EXERCISE OF THE SUPREME COURT'S SUPERVISORY POWER

The petitioner has been denied his constitutional due process right to sue the respondent in his home state where the final phase of the tort, the incurring of damages, took place. The reason, not the erroneous ones set out in the opinion, but the one in which the court stated that it was sacrificing petitioner's rights in order to try to influence other states to deny their citizens their constitutional due process right to sue a foreign tort feasor when the tort caused damages in their residence.

II. THE MISSISSIPPI SUPREME COURT, THE STATE COURT OF LAST RESORT, HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The decision of the Mississippi Supreme Court in ***David B. Gross v. Chevrolet Country, Inc.***, 655 So.2d 873 (Miss. 1995) is in direct conflict with decisions of the Fifth Circuit Court of Appeals in three cases.

In ***Brown v. Flowers, Industries, Inc., et al.***, 688 F.2d 328, (5th Cir. 1982), the only connection with Mississippi was one tortious telephone call from Jerome Kralis from his office in Mentone, Indiana, to the United States Attorney in Oxford, Mississippi. The Fifth Circuit held one phone call was sufficient to give *in personam* jurisdiction over the defendant.

In ***Thompson v. Chrysler Motors Corp.*** 755 F.2d 1162 (5th Cir. 1985), an Alabama automobile dealer's only connection with Mississippi was the sending of a defective brake cylinder to a

Mississippi dealer with instructions to place the defective brake cylinder on Heath's car. The defective brake cylinder failed and the Heaths were killed. The damage from the tort of sending the defective brake cylinder was complete with the death of the Heaths.

The Mississippi plaintiff in ***Rittenhouse v. Mabry***, 832 F.2d 1380 (5th Cir. 1987) went to Memphis, Tennessee, for medical treatment. Claiming medical malpractice, plaintiff filed suit in Mississippi. Inn holding no ***in personam*** jurisdiction, the Fifth Circuit found that no part of the "tort" was connected in Mississippi. The "damages" took place in Tennessee. If the damages had been incurred in Mississippi, the Mississippi court would have had jurisdiction.

III. THIS IS A CASE OF FIRST IMPRESSION FOR THE SUPREME COURT IN THAT IT INVOLVES AN AUTOMOBILE DEALER'S TORT OF NEGLIGENT REPAIRS DAMAGING IN HIS OWN STATE A RESIDENT OF ANOTHER STATE. THE SUPREME COURT OF MISSISSIPPI HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

All of the cases decided by the Supreme Court of the United States beginning with ***World-Wide Volkswagen v. Woodson***, 444 U. S. 246 (1980) involved product liability usually the fault of the manufacturer, not the agency. The Supreme Court has never considered the dealer-repair function and a wronged customer. The Supreme Court should take jurisdiction of this case and in its decision protect the rights of the traveling citizens of the United States. To have to return to the residency of a foreign automobile agency is to deny the wronged customer's rights.

CONCLUSION

This petition has been filed on behalf of the petitioner but also on behalf of all of the other residents of the State of Mississippi who travel outside the borders of their home state. The help of this Court is needed. The issue has never been before this Court and its guidance and protection is necessary.

It has been fifteen years since ***World-Wide Volkswagen*** was decided. There have been many changes in the automotive industry. General Motors has just announced a nation wide shake up of its dealerships changing sales and services.

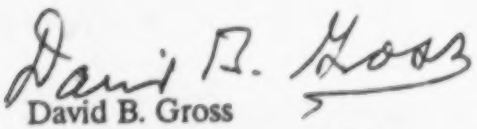
Justice Marshall in his dissenting opinion in ***Worldwide Volkswagen***, 444 US 285, may have been wrong in 1980, but his opinion is absolutely right in 1995.

> I sympathize with the majority's concern that persons ought to be able to structure their conduct so as not to be subject to suit in distant forums. But that may not always be possible. Some activities by their very nature may foreclose the option of conducting them in such a way as to avoid subjecting oneself to jurisdiction in multiple forums. This is by no means to say that all sellers of automobiles should be subject to suit everywhere; but a distributor of automobiles to a multi-state market and a local automobile dealer who makes himself part of a nationwide network of dealerships can fairly expect that the cars they sell {repair}* may cause injury in distant States and that they may be called on to defend a resulting lawsuit there.

*Added to comply with this case.

For the foregoing reasons, Petitioner respectfully requests that this Court issue a Writ of Certiorari to review the judgment of the Supreme Court of Mississippi in this case.

Respectfully submitted



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Submitted November 24, 1995

DAVID B. GROSS

v.

CHEVROLET COUNTRY, INC.

No. 92-CA-00041-SCT

Supreme Court of Mississippi

April 27, 1965

Rehearing Denied June 22, 1995

Mississippi resident sued Texas automobile mechanic corporation for negligent repairs to van, which allegedly caused further damage. Corporation moved to dismiss for lack of in personam jurisdiction, and subsequently for summary judgment for lack in personam jurisdiction. The Circuit Court, Hinds County, James E. Graves Jr., J., granted corporation's motion for summary judgment, and Mississippi resident appealed. The Supreme Court, Prather, P.J., held that: (1) Texas corporation was not subject to state long-arm statute, or corporate long-arm statute, as it was not "doing business" in state for purposes of these statutes, and (2) to subject Texas defendant to in personam jurisdiction in Mississippi would not comport with fair play and substantial justice, based on lack of purposeful contacts and failure of defendant to invoke benefits and protection of Mississippi laws.

Affirmed.

McRae, J., filed dissenting opinion, in which Lee, P.J., and Roberts, J., joined.

Paul M. Neville, Neville & Wilson, Jackson for appellant.

Charles G. Copeland and Michael W. Baxter, Copeland Cook Taylor & Bush, Jackson for appellee.

En banc.

PRATHER, Presiding Justice, for the Court:

I. INTRODUCTION

David Gross ("Gross"), a Mississippi resident, filed suit against Chevrolet Country, Inc. (Chevy"), a Texas corporation, alleging Chevy was subject to in personam jurisdiction of the Mississippi courts pursuant to our long arm statute. Gross alleged Chevy was doing business in this State and further alleged Chevy had committed a tort in part within this state. Chevy moved for summary judgment, claiming the trial court lacked in personam jurisdiction; summary judgment was granted in favor of Chevrolet. Gross now appeals from the trial court's grant of the summary judgment, seeking review of the following issues:

A. Whether the trial court erred in granting summary judgment in favor of Chevrolet Country, Inc., on the basis that the court lacked in personam jurisdiction over Chevrolet because it was not doing business within the state; and

B. Whether the trial court erred in finding no ground for the exercise of in personam jurisdiction over Chevrolet Country, Inc., in view of Gross' allegation that Chevrolet had committed a tort at least partially within the state.

The trial court did not err in granting summary judgment in favor of Chevy; therefore, this Court affirms.

II. THE FACTS AND PROCEDURAL HISTORY

Gross purchased a new 1983 General Motors Corporation (GMC) van from Martin Motor Company in Laurel, Mississippi. While traveling through Austin, Texas, on August 31, 1985, Gross' van became disabled and it was towed to Chevy, the nearest GM dealer in the area, on September 1, 1985. Chevy

performed the necessary repairs. Gross paid for the services, and Gross regained possession of his van on September 1, 1985. On January 27, 1986, Gross' van would not start. The following day it was towed to Fowler Buick-GMC (Fowler) for repairs, the cost of which was $4,723.85. Fowler employees informed Gross that the repairs to the van were necessitated by damage caused by a nut that had been left in the air intake system during previous repairs. Fowler employees also told Gross that previous work they had performed on the van had not required access to the air intake system: therefore, the nut could not have been left there by Fowler. However, previous work by Fowler had required removal of the engine cover.

On August 31, 1987, David Gross filed suit in the Hinds County Circuit Court against Chevrolet Country, Inc., GMC, and Fowler-Buick. Gross, a resident citizen of Mississippi, alleged that Chevy was a Texas corporation which had either done business in Mississippi or committed a tort within Mississippi. Gross alleged that only Chevy and Fowler had removed the engine cover with access to the air intake system. Gross claimed he had relied upon Chevy's and Fowler's service departments because of GMC's "Mr. Goodwrench" advertising programs. Gross further alleged a tortious breach of duty and negligence on the part of either Chevy or Fowler in repairing the van, alleged tortious conduct on the part of GMC because of its advertising campaign, and sought $54,873.00 compensatory and $10,000,000.00 punitive damages.

Chevy responded with a motion to dismiss for lack of in personam jurisdiction and an answer to Gross' complaint. Chevy's motion to dismiss was amended to show that it was not subject to in personam jurisdiction in Mississippi via this state's long arm statute. Gross sought to have Chevy's motion to dismiss held in abeyance until completion of discovery; Chevy's

motion to dismiss was subsequently overruled. GMC filed a motion to dismiss, which was granted except as to the count alleging breach of express warranty.

Gross next amended his complaint to allege that Fowler employees told Gross the nut could have been left in the air intake system upon manufacture. Gross also dropped the intentional misconduct count contained in the original complaint. The punitive damages requested were reduced to $1,000,000.00. Again, Chevy answered and included a motion to dismiss for lack of in personam jurisdiction. GMC again moved for summary judgment, which was granted except as to the express warranty claim. The court reserved ruling on Gross' claim that a separate express warranty claim lay in the "Mr. Goodwrench" advertising campaign. Gross then filed a motion to reconsider the order of dismissal and order of partial summary judgment. The cause was subsequently dismissed because stale, then reinstated.

Gross requested leave to file a second amended complaint. Chevy then filed a motion for summary judgment, noting that Gross' claims against it arose from repairs to Gross' van performed by Chevy within the State of Texas on one occasion and claiming that the Mississippi long arm statute did not confer jurisdiction over Chevy. In the alternative, Chevy requested summary judgment because there were no genuine issues of material fact. Chevy claimed that adequate time for discovery had passed and Gross had not and could not provide any evidence that Chevy had left the extraneous nut in the air intake system of the van. Chevy further noted that the van performed well for nine thousand (9,000) miles after Chevy had performed repairs to the van.

The judge who issued the order on Gross' motion for leave to file an amended complaint, to reconsider the previous

order of dismissal and partial summary judgment with respect to GMC, and Chevy's motion for summary judgment, noted that the previous orders of the court had been entered by a different judge. In his order, the new trial judge found that a previous order had reserved the question of all theories of recovery based on the "Mr. Goodwrench" advertising campaign. The court further found that Chevy was not subject to the Mississippi court's jurisdiction based on any alleged tortious actions in Texas. However, the court found that the question of whether Chevy was subject to jurisdiction because vicariously liable for any alleged negligence of Fowler as a co-adventurer in the "Mr. Goodwrench" advertising campaign or because it was doing business in the state as such a co-venturer, remained.

The trial court granted Gross's request to file a second amended complaint, more explicit than the first amendment regarding the "Mr. Goodwrench" campaign, and Chevy's motion for summary judgment was held in abeyance pending further discovery on the "Mr. Goodwrench" advertising issue.

Gross filed his second amended complaint, to which Chevy responded that it was not subject to the court's jurisdiction. Chevy then moved to renew its prior motion for summary judgment. Gross opposed Chevy's motion for summary judgment, claiming that there were material issues of fact precluding such relief. Gross also submitted affidavits supporting his opposition of summary judgment. Chevy moved to strike both affidavits submitted by Gross.

The trial court granted Chevy's motion for summary judgment, finding as a matter of law that Fowler was not acting on behalf of Chevy when Fowler repaired Gross' van. The court also found that Chevy had no right to control the manner in which the repairs were performed by Fowler. The court

concluded that with no imputed negligence from Fowler to Chevy, no grounds for in personam jurisdiction over Chevy remained. Gross' motion for a new trial or to alter judgment was denied.

GMC made an offer of judgment to Gross in the amount of $5,000.00, which was accepted. A summary judgment in favor of Chevy was subsequently entered by the court. This appeal followed.

III. THE LAW

A. Whether the trial court erred in granting summary judgment in favor of Chevrolet Country, Inc.:

1. on the basis that the court lacked in personam jurisdiction over Chevrolet because it was not doing business within the state; or

2. in view of Gross' allegation that Chevrolet had committed a tort at least partially within the state.

a. Summary Judgment

[1] Rule 56c of the Mississippi Rules of Civil Procedure allows summary judgment where there are no genuine issues of material fact such that the moving party is entitled to judgment as a matter of law. To prevent summary judgment, the non-moving party must establish a genuine issue of material fact by means allowable under the Rule. ***Frank v. Dore***, 635 So.2d 1369, 1373 (Miss 1994); ***Lyle v. Mladinich***, 584 So.2d 397, 398 (Miss.1991).

[2] This Court will review *de novo* a decision to grant

summary judgment. ***Nationwide Mut. Ins. Co. v. Garrigo***, 636 So.2d 658, 660 (Miss.1994); ***Short v. Columbus Rubber & Gasket Co.***, 535 So.2d 61, 63 (Miss. 1988). If any triable issues of fact exist, the lower court's decision to grant summary judgment will be reversed. Otherwise, the decision is affirmed. ***Brown v. Credit Center, Inc.*** 444 So.2d 358,362 (Miss. 1983). This Court, however, views the evidence in the light most favorable to the non-moving party. ***Turner v. Johnson***, 498 So.2d 389, 390 (Miss. 1986).

b. Mississippi Long Arm Statute

Gross contends Chevy is amenable to suit in Mississippi via our long arm statute. Miss. Code Ann. Sec. 13-3-57 (Supp. 1994). The statute allows exercise of personal jurisdiction over a nonresident corporation if it made a contract with a Mississippi resident to be performed in whole or in part in this state, committed a tort in whole or in part in this state against a resident or nonresident, or performed any character of work or service in Mississippi. Via any of these acts, a nonresident corporation is deemed to be doing business in Mississippi. Miss. Code Ann. Sec 13-3-57 (Supp. 1994).

1) "doing business"

[3] Chevy did not make any contract with a Mississippi resident which was to be performed in any part within Mississippi, nor does Gross make such a claim. Whether Chevy committed a tort in part in the state against Gross is discussed subsequently herein. But did Chevy conduct any business in Mississippi? The test to determine whether a nonresident corporation is doing business in Mississippi, as contemplated by our long arm statute, is: (1) the nonresident corporation must purposefully do some act or consummate a transaction in Mississippi; (2) the cause of action must either arise from or be

connected with the act or transaction; and (3) the assumption of jurisdiction by Mississippi must not offend traditional notions of fair play and substantial justice. ***Rittenhouse v. Mabry***, 832 F.2d 1380, 1384 (5th Cir. 1987) (citing ***Mladinich v. Kohn***, 250 Miss. 138, 147, 164 So.2d 785, 790 (1964)). The third prong of this test must be considered in light of the amount and type of activity in Mississippi, convenience of the parties, whether the parties receive benefits and protections of Mississippi's laws, and the equities of the situation. ***Rittenhouse***, 832 F.2d at 1384.

[4-6] While the current long arm statute, which became effective July 1, 1991, does not require any nexus between the nonresident's Mississippi business and injury, the version of the long arm statute in effect at the time Gross filed his complaint and amended complaints did require such a nexus. See ***Southern Pacific Transp. Co. v. Fox***, 609 So.2d 357, 360, 360, n. 5 (Miss. 1992). The prior long arm statute, at issue here, allowed assumption of jurisdiction only in actions accruing from or incident to the nonresident's actions in Mississippi. ***Southern Pacific***, 609 So.2d at 360: Miss. Code Ann. Sec. 13-3-57 (Supp. 1990) (effective from and after July l, 1980). The current version of the long arm statute, which repealed the nexus test, applies only prospectively to causes of action commenced after July l, 1991. ***Southern Pacific***, 609 So.2d at 360 n. 5. It follows that the nexus test of the prior statute and the ***Mladinich*** test for "doing business" are applicable to the case *sub judice*.

[7] The record does not reflect that Chevy purposefully performed any act or consummated any business in Mississippi. Gross argues that by virtue of Chevy's participation in the "Mr. Goodwrench" program Chevy is a joint venturer with Fowler, also a participant in the "Mr. Goodwrench" campaign. However, neither Chevy nor Fowler has any right of mutual control, they do not share profits or losses, and neither had any actual intent

to form a joint venture. Without these essential elements, there can be no joint venture. ***Hults v. Tillman***, 480 So.2d 1134, 1142-43 (Miss. 1985) (citing ***Sample v. Romine***, 193 Miss 706, 8 So.2d 257, MODIFIED, 193 Miss. 706, 10 So.2d 346 (1942)).

[8] Assuming, *arguendo*, Chevy as a joint venturer in the "Mr. Goodwrench" advertising campaign, there is still no purposeful solicitation from Chevy of Mississippi residents to come to Chevy, in Texas, for automobile repairs. ***CF Creech v. Roberts***, 908 F.2d 75, 79 (6th Cir. 1990), CERT. DENIED, 499 U. S. 975, 111 S. Ct. 1619, 113 L. Ed. 2d 717 (1991) (advertisement of particular foreign entity in forum state constitutes purposeful availment of the privilege of acting in forum state). The advertising of "Mr. Goodwrench" in Mississippi is presumably intended to induce Mississippi residents to deal with Mr. Goodwrench dealers and servicers in Mississippi. Even if a joint venture existed, the first prong of the ***Mladinich*** tripartite test for "doing business" is not met. With no purposeful act or transaction in Mississippi, the second prong of the ***Mladinich*** test--a nexus between the cause of action and the purposeful Mississippi act or transaction--cannot be met.

Continuing with the third prong of the ***Mladinich*** test, traditional notions of fair play and substantial justice would be offended by assumption of jurisdiction in this case. Chevy has never advertised in the state of Mississippi nor has it carried on any activity within the state. Mississippi is a convenient forum for Gross, but not so for Chevy. Further, Chevy has not availed itself of the benefits or protections of Mississippi's laws. As a matter of law, assertion of jurisdiction over Chevy based on its "doing business" in Mississippi would be improper. The trial court did not err.

2) Corporate Long Arm Statute

[9] Miss. Code Ann. Sec. 79-1-27, a statute regulating corporations, has been interpreted by this Court as supplemental to the long arm statute. ***Arrow food distributors. Inc. v. Love***, 361 So.2d 324, 327 (Miss. 1978) CERT DENIED 439 U. S. 1073, 99 S.CT. 845, 59 L.Ed. 39 (1979), OVERRULED ON OTHER GROUNDS, ***Hollingsworth v. Bovaird Supply Co.***, 465 So.2d 311 (Miss. 1985). Although repeal of this section was effective January l, 1988, it was in force at the time Gross commenced his action in 1987. This statute subjected foreign corporations to jurisdiction of Mississippi courts, whether or not the cause of action accrued in mississippi, if the corporation was doing business in Mississippi, ***Rittenhouse***, 832 F.2d at 1387. Section 79-1-27 required no nexus between the injury and the corporation's business activity in Mississippi. Nonetheless, the statute aids Gross not at all because he has not shown that Chevy was doing business in Mississippi.

4) Tort Within The State

[10] The mississippi long arm statute subjects a nonresident corporation to jurisdiction of this state's courts if it committed a tort, in whole or in part, within this state. Miss. Code Ann. Sec. 13-3-57 (Supp. 1994). Gross alleged that Chevy committed a tort in part within this state, either by negligently leaving the extraneous nut in the air intake system at the time it performed repairs or, vicariously, by virtue of the "Mr. Goodwrench" joint venture, through Fowler negligently leaving the extraneous nut in the air intake system. As previously discussed, the record does not evidence a joint venture between Chevy and Fowler. Consequently, any jurisdiction over Chevy based on the tort prong of our long arm must be supported by a tort committed by Chevy, in whole or in part, in Mississippi.

[11]. Assuming Chevy negligently left the nut in the air intake system when it made repairs to Gross' van, no injury occurred until five months later when the van's engine froze and Gross sustained a financial loss related to engine repairs performed by Fowler. For purposes of the tort prong of Mississippi's long arm statute, "a tortious act outside the state which causes injury within the state confers jurisdiction on the courts of that state". ***Wilkinson v. Mercantile Nat. Bank***, 529 So.2d 616, 618 (Miss. 1988). But as noted above, assertion of jurisdiction over Chevy would still offend "traditional notions of fair play and substantial justice." ***International Shoe Co. v. Washington***, 326 U. S. 310, 316, 66 S.Ct. 154. 158; 90 L.Ed. 95 (1945).

Chevy has no contacts with Mississippi which would cause reasonable anticipation that it would be "hauled into court" here. ***World-Wide Volkswagen v. Woodson***, 444 U.S. 246, 297, 100 S.Ct. 559, 567, 62 L.Ed.@d 490 (1980). Not only are there no substantial, continuous, and deliberate contacts with Mississippi, there is no purposeful availment of the Mississippi market and no invocation of the benefits or protections of Mississippi laws. ***See Burger King v. Rudzewicz***, 471 U.S. 462, 105 S.Ct. 2174, 2183, 85 L. Ed 528 (1985) ***Asahi Metal Industry Co. v. Superior Court***, 480 U. S. 102, 112, 107 S.Ct. 1026, 1032, 94 L.Ed. 92 (1987); ***Hanson v. Denckla***, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239, 2 L.Ed. 2nd 1283 (1958). In sum, Chevy does not have the requisite minimum contacts with mississippi such that it would be reasonable to require Chevy to defend a suit here. ***International Shoe***, 326 U.S. at 327, 66 S.Ct. at 158. There are no genuine issues of material fact necessary to this determination; the trial court did not err.

IV. CONCLUSION

To allow assertion of *in personam* jurisdiction by our courts in this instance would likely prompt reciprocal action by other states toward Mississippi citizens. Certainly traditional notions of fair play and substantial justice would be offended by assertion of *in personam* jurisdiction by a Texas court over a Mississippi automobile mechanic simply because a vehicle on which he had performed repairs in Mississippi subsequently, and perhaps only coincidentally, became disabled in Texas.

It can be said as a matter of law that Chevy is not amenable to jurisdiction in Mississippi pursuant to our long arm statute. There was no purposeful solicitation of Mississippi residents to come to Chevy, in Texas, for automobile repairs, therefore Chevy was not "doing business" in Mississippi. ***Rittenhouse v. Mabry***, 832 F.2d 1380, 1384 (5th Cir. 1987) (citing ***Mladinich v. Kohn***, 250 Miss. 138, 147, 164 So.2d 785, 790 (1964). Despite the "Mr. Goodwrench" advertisements, there was no joint venture between Chevy and Fowler on which to base a finding that Chevy was "doing business" in Mississippi. ***Hults v. Tillman***, 480 So.2d 1134, 1142-43 (Miss. 1985) (citing ***Sample v. Romine***, 193 Miss 706, 8 So.2d 257, MODIFIED, 193 Miss. 706, 10 So.2d 346 (1942). Assuming, *arguendo* Chevy was "doing business" in this state, traditional notions of fair play and substantial justice would be offended by requiring Chevy to defend a suit in Mississippi due to the lack of purposeful, continuous, and systematic contacts with the state and Chevy's failure to invoke the benefits and protections of Mississippi laws. ***International Shoe Co. v. Washington***, 326 U.S. 310, 316, 66 S.Ct. 154, 158; 90 L.Ed. 95 (1945). ***Burger King v. Rudzewicz***, 471 u. S. 462, 105 S.Ct. 2174, 2183, 85 L. Ed 528 (1985); ***Asahi Metal Industry Co. v. Superior Court***, 480 U.S. 102, 112, 107 S.Ct. 1026, 1032, 94 L.Ed. 92 (1987); ***Hanson v. Denckla***, 357 U.S. 235, 253, 78 S.Ct.

1228, 1239, 2 L.Ed. 2nd 1283 (1958). The corporate long arm statue also fails to make Chevy subject to suit in Mississippi because Gross did not show that Chevy was doing business in Mississippi. ***Rittenhouse***, 832 F.2d at 1387.

Although Gross alleged that Chevy committed a tort within this state, Chevy's lack of contacts with Mississippi again prevent assertion of jurisdicti on. Chevy did not have the requisite minimum contacts which would cause reasonable anticipation that it would be hauled into court here. ***World-Wide Volkswagen v. Woodson***, 444 U.S. 246, 297, 100 S.Ct. 559, 567, 62 L.Ed.@d 490 (1980). There are no genuine issues of material fact necessary to this determination; therefore, this Court affirms.

JUDGMENT IS AFFIRMED.

HAWKINS, C.J. AND SULLIVAN, PITTMAN and SMITH, J.J. concur.

McRAE, J., dissents with separate written opinion joined by DAN M. LEE, P.J., AND JAMES L. ROBERTS, J.

BANKS, J., NOT PARTICIPATING.

McRAE, Justice, dissenting:

In view of the majority's decision, any Mississippi resident who suffers an injury in Mississippi as the result of negligent repairs made to his automobile or other personal property in another state cannot seek redress in his home state, but instead, must bring suit in the jurisdiction where the repairs were made. I disagree with that proposition and therefore, dissent.

Repairs were made to Gross' GMC van at Chevrolet

Country, Inc. in Austin, Texas, in September, 1985. Five months later, at his home in Mississippi, the van refused to start and was towed to Fowler Buick-GMC in Jackson, where it was determined that the vehicle's problems arose from a nut left in the air intake system left during a previous repair job, allegedly by Chevrolet Country. It cost Gross some $4,723.85 to have the damage repaired. Gross filed suit against GMC, Chevrolet Country and Fowler Buick on August 31, 1987.

When a manufacturer places a defective product into the stream of commerce and damages result, we look to where the plaintiff's injury occurred. Since our decision in ***State Stove Manufacturing Co. v. Hodges***, 189 So.2d 113 (Miss. 1966), where a home in Mississippi was demolished by the explosion of a water heater that had been manufactured in Tennessee and sold to a wholesaler in Memphis before being sold to a Mississippi contractor and suit was filed in Mississippi against the Tennessee manufacturer, where the plaintiff might bring suit has not been an issue in these cases. Suit may be brought where the tort happened in full or in part, regardless of how attenuated the defendant's relationship to the situs of the injury. Similarly, when damages arise from negligent repairs, suit is properly brought where the injury occurred. Especially in cases where multiple defendants are involved, it therefore defies logic to suggest that s separate suit should be filed in Texas against Chevrolet Country when the injury complained of occurred in Mississippi, the plaintiff and defendant Fowler Buick are Mississippi residents and GMC, by virtue of doing business in Mississippi, is unquestionable subject to our long-arm jurisdiction.

In ***Southern Pacific Transportation Co. v. Fox***, 609 So.2d 357 (Miss. 1992), where the Court found that the Mississippi courts did not have jurisdiction to hear a FELA case arising out of a tort which occurred in Texas brought by a Texas plaintiff

against a railroad with Mississippi business relationships, the majority was reminded that under common law, such a claim could have been permissible. ID at 363-364 (Dan Lee, P. J., dissenting). The dissent focused on the language of ***Pullman Palace-car Co. v. Lawrence***, 74 Miss. 782, 22 So. 53 (1897), which provides as follows:

> (W)e had supposed there was, in our own state, no ground left for dispute that, in transitory actions, whether in tort or in contract, OUR COURTS WERE WIDE OPEN TO ANY SUITOR, RESIDENT OR NONRESIDENT, AGAINST HIS ADVERSARY, WHETHER RESIDENT OR NONRESIDENT, WHETHER A NATURAL PERSON OR AN ARTIFICIAL ONE, REGARDLESS OF WHERE THE RIGHT OF ACTION OCCURRED, IF ONLY THE CARTS HAD JURISDICTION OF THE SUBJECT MATTER, AND COULD OBTAIN JURISDICTION OF THE PARTY, EITHER A VOLUNTARY APPEARANCE, OR BY SERVICE OF PROCESS.

Pullman, 74 Miss. at 796, 22 So. 53 (emphasis added). Regardless of amendments to and repeal of language in our long-arm statutes, our courts have been open to cases against non-resident defendants. We have not closed our doors to suits against non-resident manufacturers with only fortuitous links to Mississippi. Therefore, our carts should be open to actions against non-resident businesses when a tort in whole or in part occurs in Mississippi and causes damages to a Mississippi resident. Accordingly, I dissent.

DAN M. LEE, P.J., and JAMES L. ROBERTS, J., join this opinion.

SUPREME COURT OF MISSISSIPPI

Supreme Court Case #92-CA-00041-SCT

David B. Gross

vs.

Chevrolet Country, Inc.

Petition for rehearing denied, Lee, P.J., McRae and Roberts, JJ., would grant. Banks, J., Not Participating.

Motion of Chevrolet Country, Inc., to Strike Exhibits attached to Appellants's Petition for Rehearing granted. Banks, J., Not Participating. Order entered.

Supreme Court Clerk

lwp

ccs: Michael Wayne Baxter
Hinds County Circuit Clerk